Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	)	WC Docket No. 02-112
	)	
2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules	)	CC Docket No. 00-175

REPLY COMMENTS OF CLOSECALL AMERICA, INC.

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CLOSECALL AMERICA, INC.

CloseCall America, Inc. ("CloseCall") by and through counsel, hereby submits Reply Comments in response to the Commission's Further Notice of Proposed Rulemaking in the captioned proceedings.[1] CloseCall is a Maryland-based telecommunications company offering local, long distance, digital wireless and Internet services primarily to residential and small business consumers in rural and suburban markets in Maryland, Delaware, New Jersey and several Midwestern states. CloseCall is a retail reseller of communications services that it obtains on a wholesale basis from incumbent local exchange carriers ("ILECs").

[1] In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules, WC Docket No. 02-112, CC Docket No. 00-175, Further Notice of Proposed Rulemaking (rel. May 19, 2003) ("*FNPRM*").

SUMMARY

In its Comments filed on June 30, 2003 in this proceeding, Sage Telecom, Inc. ("Sage") discussed Maryland Public Service Commission ("MD-PSC") Case No. 8927, a proceeding in which CloseCall is a party. To fully illustrate the significance of Sage's comments, CloseCall herein provides the Commission with additional information regarding the matters at issue in that case, including Verizon Maryland, Inc.'s ("Verizon's") improper tying of basic and enhanced communications services and Verizon's discriminatory treatment of competitive local exchange carriers ("CLECs").

MD-PSC Case No. 8927 was initiated in response to CloseCall's May 2002 complaint filed with the MD-PSC regarding Verizon's tying of its local telephone service to its voice messaging and broadband Internet access services in a way that is discriminatory, anticompetitive and harmful to Maryland consumers. CloseCall has requested that the MD-PSC direct Verizon to permit customers receiving local telephone services from resale-based CLECs to obtain Verizon's voice messaging service, digital subscriber line ("DSL") and Internet access services.[2] In the course of this proceeding, it has become apparent that Verizon has been discriminating against CLECs in Maryland by permitting the customers of two CLECs to maintain access to Verizon voice messaging service while refusing to provide such access to the customers of other CLECs operating in the state. As discussed below, MD-PSC Case No. 8927 illustrates that the provisions of Section 272(e) of the Communications Act of 1934, as amended (the "Act") are vital to the detection and subsequent elimination of such discriminatory behavior by Regional Bell Operating Companies ("RBOCs"), such as Verizon.

[2] Complaint of CloseCall America, Inc., MD Public Service Commission Case No. 8927, May 2, 2002 (the "*Complaint*"). WorldCom, Inc. (d/b/a MCI) has intervened in Case No. 8927 in opposition to Verizon.

I. Verizon's Unilateral Refusal to Permit Resale CLEC Customers to Obtain Verizon Voice Messaging, DSL and DSL Internet Access Services and Refusal to Permit DSL Customers to Obtain Local Telephone Service from Resale CLECs Substantially and Measurably Reduces CLEC Customer Acquisition Rates in Maryland

Verizon has unilaterally determined that local telephone service customers switching to a resale CLEC, such as CloseCall, cannot retain their existing Verizon voice messaging service. Rather, when a local telephone service customer switches to a CLEC, Verizon immediately, and without warning, terminates the customer's voice messaging service and deletes the customer's stored voice mail, greetings and other voice messaging information. When the customer contacts Verizon to restore voice messaging service, Verizon informs the customer that to obtain Verizon voice messaging service, the customer must re-subscribe to Verizon's local telephone service.

Verizon's action harms consumers and undermines local competition because resale CLECs cannot practically replicate the unique features associated with Verizon's voice messaging service, such as stutter dial tone and the ability for incoming calls to be directed to a voice mail box when the customer's line is busy. These features also are unavailable to customers using answering machines or similar devices. As a result of Verizon's tying of its voice messaging and local telephone services (*i.e.*, customers must subscribe to Verizon's local telephone service in order to obtain Verizon's voice messaging service), customers that have a need for the unique features offered by Verizon's voice messaging service cannot obtain local service from competitive providers. In this manner, Verizon is leveraging its ability to provide unique voice messaging functions in order to maintain its advantage and dominant position in the local telephone service market.

Verizon's voice messaging/local service tying strategy has a substantial detrimental effect on CloseCall's ability to obtain new customers. Before filing its complaint with the MD-PSC, CloseCall conducted a market study and determined that Verizon's refusal to permit CloseCall customers to obtain Verizon's voice messaging service reduces CloseCall's residential and small business customer acquisition rate in Maryland by at least 10%.[3] This customer loss rate measurement does not account for the number of additional customers that would migrate their local telephone service to CloseCall or another CLEC but decline to submit an order once they learn that Verizon will cancel their voice messaging service. Consequently, the total CLEC market opportunity loss attributable to Verizon's voice messaging/local telephone service tying policy may well exceed 10% of the consumer and small business market in Maryland.

Verizon also requires that customers subscribing to DSL broadband Internet access service – whether provided by a Verizon affiliate, Covad, AOL or any other provider using Verizon's wholesale DSL access service - must obtain their local telephone service only from Verizon. If a customer attempts to subscribe to a competitive local telephone service, such as CloseCall's, Verizon actually refuses to complete the carrier change order as long as the customer continues to receive DSL service. In addition, if a consumer subscribing to a competitor's local telephone service orders DSL from Verizon's affiliate, Covad, AOL or any other provider using Verizon's wholesale DSL access service, Verizon unilaterally terminates the competitor's local telephone service and replaces it with Verizon's local telephone service, regardless of the customer's choice of local telephone service provider.

[3] According to CloseCall's findings, slightly more than 10% of customers submitting local telephone service orders to CloseCall, or to any other CLEC operating in Maryland, cancel those orders when they learn that they will lose their existing Verizon voice messaging service if they migrate from Verizon. *See* Direct Testimony of Thomas E. Mazerski, MD-PSC Case No. 8927, at 15-16 (Aug. 23, 2002).

Verizon enforces these policies even when the CLEC is merely reselling Verizon's local telephone service, in which case Verizon remains the underlying telephone service provider and only a change to the customer's billing arrangement is necessary to migrate the customer from Verizon's local telephone service to the CLEC's. Obviously, as consumer adoption of broadband service grows, the anticompetitive effect of Verizon's DSL/local telephone service tying will become increasingly harmful.

Nevertheless, Verizon has argued in Case No. 8927 that the MD-PSC is powerless to stop Verizon's tying of its voice messaging and DSL Internet access services to its local telephone services because the FCC has classified these products as interstate information services which are not subject to state regulation.[4] While CloseCall herein expresses no opinion with regard to the regulatory classification of these services, Verizon's argument illustrates its refusal to acknowledge state regulatory authority regarding consumer welfare and local competition. The regulatory classification of voice messaging and DSL as "interstate information services" does not immunize from state scrutiny anticompetitive behavior relating to local telephone services, nor does it reduce a state commission's authority to protect consumer and competitive interests.[5] Rather, state commissions addressing these issues have consistently relied upon their unquestioned authority to promote voice competition and combat anti-competitive behavior.[6]

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[4] Rebuttal Testimony of Richard J. McCusker, Jr., MD-PSC Case No. 8927, at 5 (Sep. 24, 2002).

[5] *See* Second Louisiana Order, 13 FCC Rcd 20599, 20780-81, para. 314 (1998); BellSouth Memory Call Order, 7 FCC Rcd 1619,1623 (1992) (preempting Georgia Commission's order barring BellSouth from providing voice messaging service, but specifically not addressing "any aspect" of the state commission's "proposed regulatory controls").

[6] In re: BellSouth's provision of ADSL Service to end-users over CLEC loops – Pursuant to the Commission's directive in Order U-22252-E Clarification Order R-26173-A, Docket R-26173 (Mar. 19, 2003) at 7.

Clearly, RBOC tying strategies that bar a CLEC from providing to a customer on a resale basis the same local telephone service that the customer otherwise buys at retail from the RBOC constitutes the imposition of an unreasonable and discriminatory limitation on the resale of telecommunications services, and is, therefore, illegal under Section 251(c)(4) of the Act.

Moreover, combining regulated and unregulated services provides an opportunity for RBOCs to engage in improper cross-subsidization, violating the FCC's long-held principle that "carrier participation in the provision of enhanced services or detariffed CPE can not be allowed to detrimentally affect the communications ratepayer through cross-subsidization or other anticompetitive conduct."[7]

Several state commissions recently have determined that RBOC tying of voice messaging and DSL services with local telephone service is unacceptable and have acted to remedy this behavior.[8] The internal provisioning and other non-structural safeguards based on Section 272 of the Act with which the RBOCs currently must comply provide to state

[7] In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations, Docket No. 20828, 88 FCC 2d 512, 541-42 (1981) ("*Computer II*") ("If a state regulatory authority, focusing on the local activities of a carrier, perceives some potential for abuse, it may take action so long as it does not conflict with our own policies.").

[8] The Louisiana Public Service Commission directed BellSouth to provide its wholesale and retail DSL service to customers who choose to switch voice services to a CLEC. *In re: BellSouth's Section 271 Preapplication*, Docket Number U-22252-E, Order (Apr. 4, 2003). The Michigan Public Service Commission determined that the tying of DSL and voice telephone service by Ameritech (SBC) was anticompetitive and therefore violated state law. *Michigan Public Service Commission,* Case No. U-13193, Order (Jun. 6, 2002). The Kentucky Public Service Commission has ordered BellSouth not to refuse to provide its DSL service to a customer on the basis that the customer receives voice service from a CLEC, and has ordered BellSouth not to require a DSL customer to pay the cost of a separate loop simply because the customer receives voice telephone service from a CLEC. *In the Matter of Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications Inc. Pursuant to U.S.C. Section 252,* Case No. 2001-00432, Order (Feb. 28, 2003) at 1. The Florida Public Service Commission has ordered BellSouth to provide its FastAccess DSL Internet access service to customers even when BellSouth is not the customer's voice provider. *See Docket No. 010098-TP, Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996,* Final Order (2003) at 10-11.

commissions the ability to detect and remedy such anticompetitive RBOC behavior in this manner.

Section 272 requirements make it unnecessary for state commissions to "unscramble the egg" in order to detect this behavior and uncouple regulated and non-regulated products that have been inappropriately tied together. Premature sunset of these requirements would substantially handicap the ability of state commissions and CLECs to detect and remedy such anticompetitive and anti-consumer RBOC behavior, enabling RBOCs to leverage their market power, through product tying, cross-subsidization and similar practices, with impunity.

II. Verizon Is Discriminating in Its Treatment of CLECs in Maryland

In its comments filed on June 30, 2003 in this proceeding, Sage discussed Verizon's practice of providing voice messaging service to the customers of selected CLECs (*e.g.*, Lightyear, f/k/a UniDial) but not to the customers of other CLECs operating in Maryland.[9] Sage also submitted with its comments the public version of the Direct Testimony of Robert W. McCausland submitted in MD-PSC Case No. 8927, further discussing Verizon' discriminatory provisioning of voice messaging service to customers of selected CLECs.[10]

Information regarding the special arrangement between Verizon and Lightyear and a similar arrangement between Verizon and CTC Communications Inc. ("CTC")[11] has

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[9] Sage Comments at 22.

[10] Sage Comments at Exhibit B. *See also*, In the Matter of the Complaint of CloseCall America, Inc. v. Verizon Maryland Inc., Case No. 8927, Direct Testimony of Robert W. McCausland (Jan. 31, 2003).

[11] Verizon, however, describes these business arrangements as "agency agreements." *See* Supplemental Rebuttal Testimony of Richard J. McCusker, Jr. and Barbara Crawford, MD-PSC Case No. 8927, at 2-6 (Mar. 3, 2003).

come to light in the course of MD-PSC Case No. 8927.[12] As discussed below, Verizon's special arrangements with Lightyear and CTC may be part of an attempt by Verizon to game the rules for local competition. Such behavior is discriminatory, anticompetitive and a violation of Section 252 of the Act.[13]

As the Commission is well aware, Section 252 of the Act bars RBOCs, such as Verizon, from discriminating among CLECs with respect to the establishment of interconnection agreements.[14] Pursuant to the FCC's rules implementing Section 252(i), all interconnection agreements must be negotiated in good faith, submitted to the appropriate state regulator for review and approval, and the individual provisions of each interconnection agreement must be made available to other CLECs on a "pick and choose" basis.[15] The "pick and choose" rule is specifically designed to prevent incumbents from making secret deals that discriminate among CLECs. It appears that Verizon's arrangements with CTC and Lightyear violate this constraint.[16]

The MD-PSC has approved an interconnection agreement between Verizon and Lightyear (the "Lightyear ICA") and two subsequent amendments to that agreement.[17] Nothing in the Lightyear ICA provides for access to Verizon's voice messaging service by

[12] Much of this information is proprietary to the parties to MD-PSC 8927 and subject to a protective order.

[13] 47 U.S.C. § 252.

[14] *Id.*

[15] 47 C.F.R. §§ 51.301 – 51.305. The Supreme Court held that the FCC's "pick and choose" rule allows competitors to pick and choose favorable provisions from agreements that incumbents have previously negotiated with other competitors. *FCC v. Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721, 142 L. Ed.2d 834 (1999).

[16] The Minnesota Commission recently fined Qwest $26 million for engaging in similarly "secret" agreements with selected competitors in Minnesota. *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197, Order Assessing Penalties (Feb. 28, 2003).

[17] *See* Supplemental Rebuttal Testimony of Richard J. McCusker, Jr. and Barbara Crawford, MD-PSC Case No. 8927, at 3 (Mar. 3, 2003).

Lightyear's customers. However, the Lightyear ICA, as amended, includes a special "winback" discount for services provided on a resale basis to customers that Lightyear acquires from other CLECs using UNEs or CLEC-owned facilities.[18] The "winback" discount does not apply to customers that Lightyear acquires from Verizon.

Verizon maintains that, with respect to its provision of voice messaging, its arrangements with Lightyear and CTC are "agency" agreements that are not subject to Section 252 of the Act.[19] Verizon also maintains that it has refused CloseCall's request for a similar arrangement because it has made a "business decision not to repeat its failed venture with Lightyear."[20]

However, it appears that Verizon has devised a strategy to squeeze CLECs out of the Maryland local market by (1) providing voice messaging service to the customers of its preferred "bounty hunter" CLECs, Lightyear and CTC, and (2) enticing these "bounty hunters" to use that advantage against other CLECs, rather than against Verizon, by providing special "winback" discounts for resold services that these carriers provide to customers that were previously serviced by facilities-based or UNE-based CLECs.[21] Such

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[18] *See* Amendment to the Resale Agreement between Bell Atlantic – Maryland, Inc. and UniDial Telecommunications, LLC at 9 (§ 1(h)(ii)) (Aug. 9, 1999).

[19] *See* Surrebuttal Testimony of John R. Gilbert, MD-PSC Case No. 8927, at 7 (Mar. 3, 2003).

[20] Rebuttal Testimony of Richard J. McCusker, Jr., MD-PSC Case No. 8927, at 4 (Sep. 24, 2002). In addition, Verizon maintains that, because voice messaging is not a telecommunications service, as defined by the FCC, Verizon has no obligation to permit carriers to resell it. *See* Supplemental Rebuttal Testimony of Richard J. McCusker, Jr. and Barbara Crawford, MD-PSC Case No. 8927, at 5-6 (Mar. 3, 2003).

[21] Assuming this is the case, then at the same time Verizon is publicly advocating regulations intended to compel its competitors to make huge investments in local telecommunications facilities, Verizon also is providing special incentives to certain carriers to win back customers from the competitors that invest in the local network. Verizon, of course, completely denies that it is utilizing this anticompetitive strategy. *See* Supplemental Rebuttal Testimony of Richard J. McCusker, Jr. and Barbara Crawford, MD-PSC Case No. 8927, at 2 (Mar. 3, 2003).

an arrangement clearly discriminates against CLECs that are not a party to Verizon's agreements with Lightyear and CTC, in contravention of Section 252(e).[22]

As the Commission recently stated, "an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[23] Therefore, any ILEC/CLEC agreement bearing upon resale is subject to Section 252.

As discussed above, the "winback" provisions of the Lightyear agreement provides to Lightyear an incentive to target CLEC customers and convert them to resale. Verizon's special arrangement with the company provides Lightyear with a "voice mail" advantage facilitating its ability to acquire UNE-based and facilities-based CLEC customers and convert them to a Verizon resale platform in order to obtain the "winback" discount. Therefore, under the *Declaratory Order*, the arrangement between Verizon and Lightyear should be included in the interconnection agreement between the companies, and should have been filed with the MD-PSC. The fact that no such arrangement is described in the

[22] 47 U.S.C. § 252(e).

[23] *See Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-134, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26558, para. 489 (2002) ("*Qwest 9-State Order*"); *citing Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1),* WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (rel. Oct. 4, 2002) ("*Declaratory Order*"); Qwest 9-State Order, 17 FCC Rcd at 26555, para. 456, *citing Petition for Declaratory Ruling of Qwest Communications International Inc.*, WC Docket No. 02-89 at 3 (2002) ("*Qwest Section 252 Petition*"). In the *Declaratory Order*, the Commission stated the types of contractual arrangements that need not be filed: (1) settlement agreements that simply provide for backward-looking consideration that do not affect an ILEC's ongoing obligations relating to section 251; (2) forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement; and (3) agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court or trustee and that do not otherwise change the terms and conditions of the underlying interconnection agreement. *Declaratory Order*, 17 FCC Rcd at 19340-43, paras. 8-14.

interconnection agreement between Verizon and Lightyear indicates that Verizon may be circumventing the FCC's Section 252 requirements.[24]

CONCLUSION

Verizon's actions in Maryland illustrate the ability of RBOCs to leverage their market power and control over ubiquitous local network facilities for anticompetitive purposes. In Maryland, Verizon has leveraged its market power by tying regulated and unregulated products to preclude competitive market opportunity and by making discriminatory arrangements with its "bounty hunter" CLEC partners. Through these actions, Verizon is able to raise its rivals' costs and reduce their market opportunity to gain an advantage in the local and interexchange telecommunications service market. Ultimately, such Verizon actions work to the detriment of consumers.

Requiring RBOCs to continue to comply with Section 272 separate affiliate and related requirements, at least with respect to any geographical market in which the RBOC is clearly dominant, ensures that RBOCs will operate in a manner that permits state commissions to detect wrongful activity and enforce appropriate remedies. Even with these protections in place, wrongful acts such as cross-subsidization and tying of rate-regulated and unregulated services and discrimination against CLECs and CLEC customers are difficult to prove and to remedy. Without the prophylactic protections of Section 272, RBOCs will be able to engage in these anticompetitive practices with little concern for regulatory restraint or reprisal.

[24] The FCC has affirmed that state commissions are responsible for applying, in the first instance, the statutory interpretation set forth in the *Declaratory Order*. *Declaratory Order* at 19340, para. 7. In addition, the FCC will also entertain Section 208-based claims for such violations of Section 252. *Qwest 9-State Order*, 17 FCC Rcd at 26554, para. 453. Consequently, CloseCall is pursuing this matter with the MD PSC, as discussed herein.

Respectfully submitted,

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July 28, 2003

CERTIFICATE OF SERVICE

I, Evelyn Opany, a secretary in the law firm of Piper Rudnick, LLP, do hereby certify that I have on this 28th day of July, 2003 caused copies of the foregoing Reply Comments of CloseCall America, Inc. to be served to the following:

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